SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 534

W. J. RAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRANCIS MURPHY,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of W. J. Ray respectfully shows to this Honorable Court:

Petitioner was convicted (R. 89) in the District Court of the United States for the District of North Dakota, upon an indictment (R. 1) charging him with aiding and abetting an officer of an insured bank in misapplying the funds and credits of said bank, in violation of the provisions of Section 5209 of the Revised Statutes of the United States, as amended (U. S. C. A., Title 12, Section 592).

Upon such conviction, he was sentenced to imprisonment for a term of three years (R. 90).

After the matter had been submitted to the Jury, and after it had deliberated thereon for about twenty-three

hours, the trial court communicated with the jury, out of court and in the absence of the petitioner and his counsel (R. 291-306).

An appeal was duly perfected from the judgment of conviction to the Circuit Court of Appeals for the Eighth Circuit (R. 291-292).

Thereafter, upon leave of the Circuit Court of Appeals, the alleged erroneous communication of the District Court with the jury was presented upon motion for a new trial (R. 291-300), which motion was denied (R. 303-305).

The matter was thereupon certified (R. 290-307) to the Circuit Court of Appeals, upon a supplemental record pursuant to its direction (R. 291-292).

On September 23, 1940, the Circuit Court of Appeals filed its opinion, wherein the judgment and sentence was affirmed (R. 310), holding that said erroneous communication was non-prejudicial (R. 320).

Thereupon a petition for rehearing, limited to a consideration of the question of said erroneous communication and the decision of the Circuit Court of Appeals thereon was duly filed (R. 323), which petition was, on October 15, 1940, denied (R. 326).

Thereupon, a motion for an order staying the issuance of the mandate was duly filed (R. 326), which motion, on October 18, 1940, was granted for a period of thirty days (R. 327).

Your petitioner is advised that the Circuit Court of Appeals was in error in affirming the judgment of the District Court, and should have directed a new trial in conformity with the rule announced in:

Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, 39 S. C. R. 435;

Shields v. *United States of America*, 273 U. S. 583, 47 S. C. R. 478, 71 L. Ed. 787.

Your petitioner is advised that the decision of the Circuit Court of Appeals, holding, in effect, that the erroneous communication of the trial court with the jury was not prejudicial and did not require a reversal is in conflict with applicable decisions of this Honorable Court.

Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, 39 S. C. R. 435;

Shields v. *United States of America*, 273 U. S. 583, 47 S. C. R. 478, 71 L. Ed. 787.

Your petitioner presents herewith, as a part of this petition, a transcript of the record in the Circuit Court of Appeals.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case, numbered and entered on its docket No. 11641—W. J. Ray, appellant, vs. United States of America, appellee, and that the judgment of that court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

W. J. RAY,
By FRANCIS MURPHY,
Counsel for Petitioner,
Fargo, North Dakota.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 534

W. J. RAY,

vs. *Petitioner,*

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT.

I.

The opinion in the Circuit Court of Appeals has not been officially reported at the time of filing of this brief. The opinion is that of the Circuit Court of Appeals of the Eighth Circuit, and is dated and was filed on September 23, 1940, the opinion appearing in the transcript of the record (R. 310).

II.

The date of the judgment is September 23, 1940. Petition for rehearing was denied October 15, 1940 (R. 346). This petition, therefore, is filed within thirty days' period provided by Rule XI of the Rules governing the procedure in criminal cases.

III.

The specific claim advanced by the petitioner herein is that the Circuit Court of Appeals erred in holding that an improper communication between the court and the jury does not require a reversal, if it appears that the same was not prejudicial.

This ruling petitioner asserts is in conflict with applicable decisions of this Honorable Court:

Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, 39 S. C. R. 435;

Shields v. *United States of America*, 273 U. S. 583, 47 S. C. R. 478, 71 L. Ed. 787.

IV.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of Congress of February 13, 1925, U. S. C. A., Title 28, Section 347.

V.

The cases believed to sustain the jurisdiction of the Supreme Court are as follows:

Shields v. *United States of America*, 273 U. S. 583, 47 S. C. R. 478, 71 L. Ed. 787.

VI.

A complete statement of the case has been given in the petition, and is not repeated here for reasons of brevity.

VII.

The point upon which petitioner intends to rely in this case is specified as follows:

The Circuit Court of Appeals erred in finding and holding that an improper and erroneous communication between the

court and jury, made out of court and in the absence of the petitioner and his counsel, did not warrant a reversal because the same was non-prejudicial.

VIII.

The controlling fact that a communication between the court and jury pertaining to the case took place out of court and in the absence of petitioner and his counsel is without dispute.

The Circuit Court of Appeals in its opinion undertook to inquire into a collateral question; that is, whether or not such improper communication resulted in actual prejudice.

Petitioner believes that all such communications are forbidden, and that an inquiry as to whether or not prejudice actually resulted is not permissible.

The applicable decisions of this Court, by implication at least, appear to so hold.

Fillippon v. *Albion Vein Slate Co.*, 250 U. S. 76, 63 L. Ed. 853, 39 S. C. R. 435;

Shields v. *United States of America*, 273 U. S. 583, 47 S. C. R. 478, 71 L. Ed. 787.

It is, therefore, respectfully submitted, that this case is one calling for the exercise of this Court of its supervisory power, and that a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Eighth Circuit, and finally reverse it.

FRANCIS MURPHY,
Counsel for Petitioner,
Fargo, North Dakota.

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CITATIONS

275823—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 534

W. J. RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Judge relating to the question involved herein, which he rendered in connection with the denial of petitioner's motion for a new trial, appears at R. 303–305. The opinion of the Circuit Court of Appeals (R. 309–319) is reported in 114 F. (2d) 508.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 23, 1940 (R. 320), and a petition for rehearing (R. 320–322) was denied October 15, 1940 (R. 322). The petition for a writ

of certiorari was filed October 29, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether, under the circumstances of the case, reversible error resulted because of a communication between the trial judge and the jury subsequent to the submission of the case to the latter, such communication not having been made in open court or in the presence of petitioner or his counsel.

STATEMENT

The petitioner was convicted (R. 89) in the District Court for the District of North Dakota under counts two through thirty-two of an indictment (R. 11–87) charging him with violating Section 5209, Revised Statutes, as amended (U. S. C., Supp. V, Title 12, Sec. 592), by aiding and abetting an officer of a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, wilfully to misapply the funds and credits of such bank.[1] The jury accompanied the verdict of guilty with a recommendation of leniency (R. 89). Petitioner was sentenced to imprisonment for a period of three years on each count, to run concurrently

[1] The first count of the indictment (R. 2–10), charging a conspiracy to violate Section 5209, Revised Statutes, as amended, was dismissed by the court (R. 90).

(R. 90), and on appeal the Circuit Court of Appeals for the Eighth Circuit unanimously affirmed the judgment of conviction (R. 309–320) and denied rehearing (R. 322).

The only question presented to this Court deals with a communication between the trial judge and the jury, made subsequent to the submission of the case but not in open court or in the presence of the petitioner or his counsel. The facts pertaining to this question are as follows: After an appeal had been taken, petitioner filed in the Circuit Court of Appeals a motion to include in the record certain affidavits of jurors. The motion was denied, but in its order the Circuit Court of Appeals stated that it appeared that more than five days after trial, the petitioner had moved for a new trial on the ground of a newly discovered procedural irregularity, but was prevented from presenting the motion and supporting affidavits to the trial court through no fault of his own, the trial judge having been absent from the district. The Circuit Court of Appeals ordered that the appeal should remain pending; that the petitioner be permitted to present the motion for a new trial and supporting affidavits to the District Court; and that the latter should hear the motion, take appropriate action thereon, and certify such proceedings to the Circuit Court of Appeals in a supplemental record (R. 289–292).

Thereafter the petitioner moved in the District Court to vacate the judgment of conviction and for a new trial on the ground that an improper com-

munication was had with the jury in the absence of petitioner and his attorney (R. 292–293). In support of this motion, petitioner submitted affidavits of three jurors (R. 293–296). These affidavits stated that after the jury had deliberated for about twenty-three hours, they advised the bailiff that they desired to be informed whether the judge would consider a recommendation of leniency; that thereafter a deputy marshal entered the jury room and told them that the judge would permit such a recommendation and consider and act on the same; and that affiants believed that by recommending leniency, a light sentence would be imposed.

In opposition to the motion, the Government submitted affidavits of the deputy marshal and three other jurors. The deputy marshal averred that he was told by the bailiff that the jury wanted to know if it was possible for them to recommend leniency; that he entered the jury room and was asked such question; that he informed the jury that he could not tell them whether such recommendation would be proper, but would present their question to the judge if they so desired; that upon the request of the jury he went to the judge and was informed that the jury could recommend leniency, but the recommendation should be on a separate paper rather than on the verdict form; that affiant thereupon conveyed this information to the jury; that at no time while he was in the jury room was there any discussion of the case; and that the judge did not state nor did affiant inform the jury that such

recommendation would be acted upon by the judge (R. 297–298). Two of the jurors stated that the question of recommending leniency was considered by the jury after they had agreed upon a verdict of guilty; that one of the jurors requested the bailiff to ascertain from the judge if they might recommend leniency; that thereafter the deputy marshal informed them that he had seen the judge and such recommendation was permissible, whereupon they made the recommendation and attached it to the verdict (R. 298–299). The third juror recited the same facts in more detail. He stated that after due consideration the jury unanimously agreed upon a verdict of guilty; that thereafter, because of doubt as to whether they might properly recommend clemency, they called in the deputy marshal and asked whether such a recommendation would offend the judge; that the deputy marshal did not think the judge would be offended, but offered to communicate with him and find out; and that shortly thereafter the deputy marshal returned and informed the jury that he had discussed the matter with the judge and that the latter would not be offended by a recommendation of clemency (R. 299–300).

The motion for a new trial was heard and denied (R. 302–303). In a memorandum opinion (R. 303–305) the District Court stated, *inter alia,* that it was not claimed in any of the affidavits presented by the petitioner that the communication with the jury occurred prior to the time the jury had agreed

upon its verdict but that on the contrary from the affidavits submitted by the Government "it affirmatively and conclusively appears that at the time some of the jury inquired of the Deputy Marshal as to whether the Judge would be offended if the jury should recommend leniency for the defendant the jury had, in fact, agreed upon its verdict of guilty. That being true, the jury had completely and finally concluded all of its deliberations pertinent to its duties and functions as a jury. Its only unfinished duty as a jury was to formally return its verdict into Court that the same might be read and recorded." While the court for these reasons thought that the communication was not improper, it concluded its opinion by holding that even if it be assumed that it was improper, "it seems clear that it must have been without prejudice to the defendant."

After stating that it is improper for a trial judge to hold any important communication with the jury unless it is done openly and with opportunity to the accused and his counsel to be present, the Circuit Court of Appeals held that the petitioner was not prejudiced by the communication in question since the record affirmatively showed that a verdict had been reached by the jury before the communication occurred and that "the verdict was not conditional on the opportunity of the jury to recommend leniency or any promise by the court

that such recommendation would be followed" (R. 318–319).[2]

ARGUMENT

The petitioner does not question that the Circuit Court of Appeals correctly determined that the record affirmatively showed that he was not prejudiced by the communication involved. He contends in effect that such communication was *per se* reversible error, with the result that the Circuit Court of Appeals was without power to inquire into whether the petitioner was actually prejudiced by the communication.

We submit that the Circuit Court of Appeals properly gave consideration to the question whether the communication was prejudicial in determining if reversible error was committed.

It has been recognized in a number of cases involving analogous communications that a reversal is not required if it affirmatively appears that there was no prejudice. *Ah Fook Chang* v. *United States,* 91 F. (2d) 805, 809–810 (C. C. A. 9th);

[2] While both the District Court (R. 304) and the Circuit Court of Appeals (R. 318) stated that petitioner's motion for a new trial was not based on "newly discovered evidence," within the meaning of Rule II, paragraph 3, of the Criminal Appeals Rules promulgated by this Court, the Circuit Court of Appeals nevertheless considered the question presented by the motion for the reason that "the record reveals an irregularity that deserves attention" (R. 318). For the same reason the Government does not urge that the Circuit Court of Appeals had no power to review the question.

Outlaw v. *United States,* 81 F. (2d) 805, 808–809 (C. C. A. 5th), certiorari denied, 298 U. S. 665; *Little* v. *United States,* 73 F. (2d) 861, 866–867 (C. C. A. 10th); *Sandusky Cement Co.* v. *A. R. Hamilton & Co.,* 287 Fed. 609, 611–612 (C. C. A. 6th), certiorari denied, 262 U. S. 759; *Dodge* v. *United States,* 258 Fed. 300, 303–305 (C. C. A. 2d), certiorari denied, 250 U. S. 660.

Even if it be assumed that such a communication has relation to the substantial rights of a defendant, and hence is not within the purview of Section 269 of the Judicial Code as amended (U. S. C., Title 28, Sec. 391), requiring the courts to disregard technical errors, defects or exceptions which do not affect the substantial rights of the parties,[3] it is settled that a reversal is not required where it affirmatively appears from the record that the error is harmless. *McCandless* v. *United States,* 298 U. S. 342, 347–348, and cases cited.

Neither *Fillippon* v. *Albion Vein Slate Co.,* 250 U. S. 76, nor *Shields* v. *United States,* 273 U. S. 583, cited by the petitioner, establishes a contrary rule. Indeed, in the *Fillippon* case, which involved a supplementary instruction given to the jury in the

[3] Section 269, as amended, so far as pertinent, reads: "* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties." See *Berger* v. *United States,* 295 U. S. 78, 82.

absence of the parties and their counsel, the Court expressly recognized that error in the course of trial does not furnish ground for reversal where it affirmatively appears that it is harmless. The Court held, however, that the instruction in question, so far from being harmless, "was erroneous and calculated to mislead the jury" (p. 82). In the *Shields* case the Government did not contend that the communication was harmless and there was no finding, as here, that the record affirmatively showed it to be nonprejudicial. Moreover, it would appear from the facts recited in the opinion in that case that the trial judge's communication may well have caused the jury to return a verdict of guilty as to Shields when otherwise the jury would have disagreed.

CONCLUSION

The case was correctly decided by the Circuit Court of Appeals and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

NOVEMBER 1940.

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